Supreme Court, U.S.
FILED

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No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

NORMAN LEE OOLEY, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether respondent validly consented to a search of his residence when he agreed to a term of probation that authorized any law enforcement officer to search respondent or his home.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No.

UNITED STATES OF AMERICA, PETITIONER

v.

NORMAN LEE OOLEY, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-5a) is reported at 116 F.3d 370.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1997. A petition for rehearing was denied on September 11, 1997. App., *infra*, 6a. On December 1, 1997, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including January 9, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

1. In 1994, respondent Norman Lee Ooley, Jr., was convicted of second degree burglary in California state court. As a term of his probation, respondent agreed that his person or residence would be subject to search "at any time with or without a warrant, and with or without reasonable cause, when required by the P.O. [probation officer] or other law enforcement officer." App., *infra*, 2a. That term of probation is generally called the "Fourth Waiver." *Ibid.*[1]

In June 1995, California police officers searched respondent's residence without a warrant. They discovered a loaded pistol and ammunition. App., *infra*, 2a.

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[1] The California Supreme Court has held that the Fourth Waiver constitutes a valid consent to search. See *People* v. *Bravo*, 43 Cal.3d 600 (1987), cert. denied, 485 U.S. 904 (1988). The court in *Bravo* explained that "[a] probationer * * * consents to the waiver of his Fourth Amendment rights in exchange for the opportunity to avoid service of a state prison term," *id.* at 608, and stated that "[a] probationer's waiver of his Fourth Amendment rights is no less voluntary than the waiver of rights by a defendant who pleads guilty to gain the benefits of a plea bargain," *id.* at 609.

Respondent was charged in a three-count federal indictment with being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. 922(g)(1) and 924(a). App., *infra*, 2a. He entered a conditional guilty plea, reserving the right to appeal the district court's denial of his motion to suppress the seized evidence. *Id.* at 2a-3a.

2. The court of appeals vacated and remanded. App., *infra*, 1a-5a.[2] The court held that, "[w]ith respect to probationers, * * * the legality of a warrantless search depends upon a showing that the

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[2] The government argued in the court of appeals that "[respondent] is simply wrong when he presents the notion that federal standards are to be used to judge the validity of a California law enforcement officer's search of a California probationer who has agreed to a 'Fourth Waiver.'" Gov't C.A. Br. 20. The court of appeals interpreted that statement to mean that "[t]he government * * * asserts that we must look solely to California law rather than to federal law in order to determine the legality of the warrantless search of [respondent's] residence," App., *infra*, 3a, and it rejected that argument. The thrust of the government's argument, however, was that searches of state and federal probationers would be subject to different constitutional analysis precisely because state probationers—unlike their federal counterparts—had consented to suspicionless searches as a condition of probation. See Gov't C.A. Br. 17-18; see also *id.* at 14-15 (noting that, "when a [California] defendant bargains for probation rather than imprisonment, part of the quid pro quo is that the defendant waives any Fourth Amendment rights he or she may have") (citing *Bravo*, 43 Cal.3d at 608-609). As one judge in the Ninth Circuit has noted, there is some confusion in circuit law on the role of state law in analyzing state parole or probation searches, but it is clear that federal law should control the ultimate validity of the search. *United States* v. *Conway*, 122 F.3d 841, 843-844 (9th Cir. 1997) (Wallace, J., concurring), petition for cert. pending, No. 97-6957 (Nov. 26, 1997).

search was a true probation search and not an investigation search." *Id.* at 4a. It stated that, "[u]nlike an investigation search, a probation search should advance the goals of probation, the overriding aim of which is to give the probationer a chance to further and to demonstrate his rehabilitation while serving a part of his sentence outside the prison walls." *Id.* at 4a-5a (brackets and internal quotation marks omitted). The court also asserted that a probation search "cannot be a mere 'subterfuge' enabling the police to avoid having to obtain a search warrant" and indicated that, "at a minimum, the 'police must have reasonable suspicion, that an item to be searched is owned, controlled, or possessed by [the] probationer.'" *Id.* at 5a (quoting *United States* v. *Davis*, 932 F.2d 752, 758 (9th Cir. 1991)). The court of appeals vacated the district court's decision and remanded the case for further proceedings to determine "whether the conduct complained of was a probation search rather than an investigation search." *Ibid.*

REASONS FOR GRANTING THE PETITION

This Court's decisions make clear that "a search conducted pursuant to a valid consent is constitutionally permissible," *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222 (1973), and that the validity of the search does not turn on the officers' possession of either individualized suspicion or a warrant. Accord, *e.g.*, *Illinois* v. *Rodriguez*, 497 U.S. 177, 181 (1990); *Zap* v. *United States*, 328 U.S. 624, 628 (1946). As a condition of his probation, respondent agreed in writing that his person or residence could be searched "at any time with or without a warrant, and with or without reasonable cause." App., *infra*, 2a. The agreement by its terms extends to searches conducted by a pro-

bation officer or "other law enforcement officer." *Ibid.* Thus, if the Fourth Waiver constitutes a valid consent to search, there would be no basis for suppressing the evidence obtained by the police in this case, regardless of whether the search is characterized as a "probation search" or an "investigation search."[3] It would likewise be irrelevant whether the officers conducting the search had reasonable suspicion of wrongdoing. In contrast to the Ninth Circuit, the California Supreme Court has held searches under identical conditions to be valid. See note 1, *supra.*

On November 26, 1997, this Court granted the petition for a writ of certiorari in *Pennsylvania Board of Probation and Parole* v. *Scott*, No. 97-581. The Court invited the parties to brief and argue the following question: "Must a search of a parolee's residence be based on reasonable suspicion to be valid under the Fourth Amendment where the parolee has consented to searches as a condition of his parole?"[4] If this Court concludes that reasonable suspicion is not required to justify a consent search in such a case, its decision will very likely be dispositive of the validity of the search here. Under those circumstances, a grant of certiorari and a remand for further consideration would be warranted. We therefore suggest that the petition be held pending this Court's decision in *Scott* and disposed of as appropriate in light of that decision.

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[3] The California Supreme Court has construed the Fourth Waiver to authorize a search conducted "for a proper probation or law enforcement purpose." *Bravo*, 43 Cal.3d at 609.

[4] *Scott* also presents the question whether the exclusionary rule applies to parole revocation proceedings.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of *Pennsylvania Board of Probation and Parole* v. *Scott*, No. 97-581, and disposed of as appropriate in light of the resolution of that case.

Respectfully submitted.

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JANUARY 1998

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-50279

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

NORMAN LEE OOLEY, JR., DEFENDANT-APPELLANT

Argued and Submitted,
March 6, 1997, as to Appellant

Submitted March 6, 1997,
as to Appellee*

Decided June 25, 1997

Before: SCHROEDER, WIGGINS, and LEAVY, Circuit Judges.

LEAVY, Senior Circuit Judge:

In this case we must determine whether the district court erred by denying without an evidentiary hearing a motion to suppress evidence obtained in a warrantless search of the defendant's residence. For

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* The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument as to appellee. Fed. R.App. P. 34(a) and Ninth Circuit Rule 34-4.

the reasons which follow, we vacate and remand for further proceedings.

FACTS AND PRIOR PROCEEDINGS

On December 29, 1994, Norman Lee Ooley, Jr. was convicted in California state court on a charge of second degree burglary. As a condition of his probation, Ooley agreed in writing to a so-called "Fourth Waiver", *i.e.*, he consented to "[s]ubmit [his] person, property, place of residence, vehicle, personal effects to search at any time with or without a warrant, and with or without reasonable cause, when required by the P.O. [probation officer] or other law enforcement officer." SER at 2.

Less than six months later, Escondido police officers arrested Ooley on suspicion of burglary following a high speed automobile chase. In Ooley's truck police found burglary tools and weapons, including ammunition and a loaded "zip gun." Shortly thereafter, Escondido police officers conducted a warrantless search of Ooley's residence where they found, *inter alia*, a loaded pistol and ammunition. The Escondido police contacted the federal Bureau of Alcohol, Tobacco and Firearms ("ATF"). The ATF later determined that the pistol and ammunition seized from Ooley's house had not been manufactured in California.

On September 20, 1995, a federal grand jury handed down a three-count indictment charging Ooley with being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924(a). Ooley filed various pretrial motions, including a motion to suppress the evidence against him. In that motion, Ooley argued that the warrantless search of his residence had been an investigation search rather

than a probation search and therefore ran afoul of the Fourth Waiver condition of his probation. The district court denied Ooley's motion to suppress without conducting an evidentiary hearing. Ooley then entered a conditional guilty plea to all three counts of the indictment pursuant to Fed.R.Crim.P. 11(a)(2). The district court sentenced Ooley to fifteen months in prison, two years of supervised release, and imposed a $150 penalty assessment. Ooley has timely appealed. We have jurisdiction under 28 U.S.C. § 1291, and review *de novo*. *See United States v. Polanco*, 93 F.3d 555, 560 (9th Cir.), *cert. denied*, — U.S. ——, 117 S.Ct. 405, 136 L.Ed.2d 319 (1996).

ANALYSIS

The government argues that Ooley consented to the warrantless search of his residence by having accepted, as a condition of his probation, the state's requirement that he relinquish his Fourth Amendment protections. The government further asserts that we must look solely to California law rather than to federal law in order to determine the legality of the warrantless search of Ooley's residence. While conceding, as he must, the legality of the Fourth Waiver as a condition of his state probation, *see Griffin v. Wisconsin*, 483 U.S. 868, 872-73, 880, 107 S.Ct. 3164, 3167-68, 3172, 97 L.Ed.2d 709 (1987), Ooley argues that the validity of a warrantless search conducted by state law enforcement officers is ultimately a question of federal law.[1]

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[1] Ooley also contends that the search was improper because the police conducted it without first determining whether Ooley was a probationer subject to a Fourth Waiver condition. This contention finds no support in the law. *See People v. Velasquez*, 21 Cal.App.4th 555, 26 Cal.Rptr.2d 320, 321-22 (1993)

Ooley is right. While federal courts must look to state law to determine the validity of the underlying probation condition itself, *id.* at 875, 107 S.Ct. at 3169, and may consider state precedent for its persuasive value, *United States v. Davis*, 932 F.2d 752, 758 (9th Cir.1991) (as amended), "the validity of a search conducted by state law enforcement officers is ultimately a question of federal law." *Id.*

With respect to probationers, we have long recognized that the legality of a warrantless search depends upon a showing that the search was a true probation search and not an investigation search. *See, e.g., United States v. Vought*, 69 F.3d 1498, 1501 (9th Cir.1995); *United States v. Watts*, 67 F.3d 790, 794 (9th Cir.1995), *rev'd on other grounds*, — U.S. ——, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997); *United States v. Davis*, 932 F.2d at 758; *United States v. Harper*, 928 F.2d 894, 897 (9th Cir.1991); *United States v. Butcher*, 926 F.2d 811, 815 (9th Cir.1991); *United States v. Richardson*, 849 F.2d 439, 441 (9th Cir.1988); *United States v. Jarrad*, 754 F.2d 1451, 1454 (9th Cir.1985); *United States v. Cordova*, 650 F.2d 189, 190 (9th Cir.1981) (per curiam); *United States v. Consuelo-Gonzalez*, 521 F.2d 259, 263 (9th Cir.1975) (en banc) (federal probationer); *Latta v. Fitzharris*, 521 F.2d 246, 249 (9th Cir.1975) (en banc); *Smith v. Rhay*, 419 F.2d 169, 162-63 (9th Cir.1969).

Unlike an investigation search, a probation search should advance the goals of probation, the overriding

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(investigating officer's lack of knowledge concerning adult defendant's probationary status irrelevant for purposes of Fourth Waiver searches under California law); *In re Tyrell J.*, 8 Cal.4th 68, 32 Cal.Rptr.2d 33, 44, 876 P.2d 519, 530 (1994) (same with respect to juvenile offender).

aim of which "is to give the [probationer] a chance to further and to demonstrate his rehabilitation while serving a part of his sentence outside the prison walls." *Latta v. Fitzharris*, 521 F.2d at 249. *See also United States v. Merchant*, 760 F.2d 963, 969 (9th Cir. 1985) (a probation search must involve "a genuine attempt to enforce probation"). While the warrantless search of a probationer's home need not necessarily be initiated, conducted, or even supervised by a probation officer to qualify as a probation search, it cannot be a mere "subterfuge" enabling the police to avoid having to obtain a search warrant (oftentimes characterized as using probation officers as "stalking horses" for the police). *See United States v. Davis*, 932 F.2d at 758 (at a minimum, the "police must have reasonable suspicion, that an item to be searched is owned, controlled, or possessed by probationer, in order for the item to fall within the permissible bounds of a probation search").

The district court's denial of Ooley's motion to suppress can be upheld only if the record shows that the warrantless search was a true probation search and not an investigation search. As we are unable to determine from this record whether the conduct complained of was a probation search rather than an investigation search, the decision of the district court must be vacated and the case remanded for an evidentiary hearing on this issue.

VACATED and REMANDED for further proceedings.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-50279

D.C. No. CR-95-01558-MLH

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

NORMAN LEE OOLEY, JR., DEFENDANT-APPELLANT

[Filed Sept. 11, 1997]

ORDER

Before: SCHROEDER, WIGGINS, and LEAVY, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judge Schroeder has voted to reject the suggestion for rehearing en banc, and Judges Wiggins and Leavy have so recommended.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

No. 97-1144

UNITED STATES OF AMERICA,

PETITIONER,

- VS -

NORMAN LEE OOLEY, JR.,

RESPONDENT.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Title 18, United States Code § 3006A(d)(6) and Rule 39 of this Court, Petitioner, Norman Lee Ooley, Jr., asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of fees or costs and to proceed *in forma pauperis*.

Petitioner was represented by counsel appointed pursuant to Title 18, United States Code § 3006(a) in the district court and on appeal to the Ninth Circuit Court of Appeals.

Respectfully submitted,

Dated: March 24, 1998

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No. 97-1144

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

UNITED STATES OF AMERICA,

Petitioner,

- vs -

NORMAN LEE OOLEY, JR.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court deny review of an issue that Petitioner did not present to the Court of Appeals and which the Court of Appeals did not address?

2. Should this Court deny review of the holding of the Court of Appeals for the Ninth Circuit when it concluded that the validity of a search by state law enforcement officers, the fruits of which were used in a federal prosecution, is ultimately a question of federal law?

3. Should this Court refuse to hold the petition pending disposition of PENNSYLVANIA BOARD OF PROBATION AND PAROLE v. SCOTT, NO. 97-581, because Petitioner has failed to show any grounds of entitled relief to justify holding the petition when the questions presented in Scott are not instantly dispositive of the issues herein presented?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

UNITED STATES OF AMERICA,

Petitioner,

- vs -

NORMAN LEE OOLEY, JR.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Counsel for Respondent Ooley hereby files this brief in opposition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The Court of Appeals opinion is reported at 116 F.3d 370.

JURISDICTION

The judgment of the Court of Appeals is entered on June 25, 1997; petition for rehearing was denied on September 11, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported

by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On June 14, 1995, at approximately 4:06 a.m., an officer from the Escondido Police Department observed that the front door to the Escondido Market was open. As the officer began to investigate, he observed Mr. Ooley coming from the parking area, and despite being ordered to stop, he left the scene in a truck. The license plate number was broadcast to other officers and, approximately seven minutes later, the truck and Mr. Ooley were located. Mr. Ooley was detained, arrested, and questioned.

At approximately 9:10 a.m., several officers from the Escondido Police Department, went to Mr. Ooley's residence, and conducted a warrantless search of his residence, while Mr. Ooley was still detained. Mr. Ooley had probationary search conditions.[1] His probation officer neither participated, nor was present, during the search. The police recovered a revolver and five rounds of ammunition within the residence.

Mr. Ooley was subsequently charged in a federal indictment with violations of 18 U.S.C. §§ 922(g)(1) and 924(a), felon in possession of a firearm and ammunition. He conditionally

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[1] On December 29, 1994, Mr. Ooley accepted a grant of probation following his conviction for second degree burglary. As a condition of probation, Mr. Ooley agreed to "[s]ubmit [his] person, property, place or residence, vehicle, personal effects to search at any time with or without a warrant, and with or without reasonable cause, when required by the [probation officer] or other law enforcement officer."

pled guilty, pursuant to Fed. R. Crim. P. 11(a)(2), specifically reserving the right to appeal the district court's order denying the motion to suppress evidence.

The basis of that appeal was whether the district court erred in ruling that the validity of a search by state law enforcement officers, the fruits of which were used in a federal prosecution, is determined solely by state law.

The Court of Appeals vacated the district court's decision, ruling that the validity of a search conducted by state law enforcement officers is ultimately a question of federal law. Thus, the Court of Appeals remanded the case for further proceedings. United States v. Ooley, 116 F.3d 370 (9th Cir. 1997).

REASONS FOR DENYING THE WRIT

I.

PETITIONER NEVER PRESENTED TO THE NINTH CIRCUIT THE QUESTION WHETHER RESPONDENT VALIDLY CONSENTED TO SEARCH OF HIS RESIDENCE.

Petitioner contends that the question presented for review is whether Respondent validly consented to a search of his residence when he agreed to a term of probation that authorized any law enforcement officer to search Respondent or his home. The framework for the analysis of the validity of a consent to search has been established by Schneckloth v. Bustamonte, 412 U.S. 218 (1973). This Court observed that the question is one of whether there is an "essentially free and unrestrained choice." Schneckloth, 412 U.S. at 225.

Here, the parties never presented the issue of the validity of Respondent's consent. Thus, neither the district court, nor the Ninth Circuit, was given an opportunity to make a determination pursuant to the Schneckloth voluntariness test.

This Court has stated that ordinarily it will not consider claims that were neither raised before or considered by the court of appeals. Adickes v. S.H. Kress and Co., 398 U.S. 144, 147 n.2 (1970). The issue of whether Respondent "validly consented" to a search of his residence when he agreed to a term of probation that authorized any law enforcement officer to search Respondent or his home is not contained in the record for this Court to review. This Court should therefore decline Petitioner's invitation for this Court to consider review of this case.

II.

THIS COURT SHOULD DENY REVIEW OF THE NINTH CIRCUIT OPINION BECAUSE THERE IS NO DISPUTE REGARDING THE ULTIMATE ISSUE: WHETHER THE VALIDITY OF A SEARCH CONDUCTED BY STATE LAW ENFORCEMENT OFFICERS IS ULTIMATELY A QUESTION OF FEDERAL LAW.

The fundamental issue raised in the court of appeals was whether the district court erred in applying solely state law, ignoring federal precedent, in analyzing the validity of a search by state law enforcement officers, the fruits of which were used in a federal prosecution. The government argued in the Ninth Circuit that "[Respondent] is simply wrong when he presents the notion that federal standards are to be used to judge the validity of a California law enforcement officer's search of a California

probationer who has agreed to a Fourth Waiver." Gov't C.A. Br. 20.

However, the Ninth Circuit agreed with Respondent in that "[w]hile federal courts must look to state law to determine the validity of the underlying probation condition itself . . . and may consider state precedent for its persuasive value, . . .the validity of a search conducted by state law enforcement officers is ultimately a question of federal law." United States v. Ooley, 116 F.3d 370, 372 (9th Cir. 1997), citing United States v. Davis, 932 F.2d 752, 758 (9th Cir. 1991).

There can be no dispute that the law is clear regarding this fundamental issue: federal law governs the admissibility of evidence in federal court, even if that evidence was gathered by state officials. United States v. Conway, 122 F.3d 841, 843-44 (9th Cir. 1997) (Wallace, J., concurring), petition for cert. denied, 118 S.Ct. 730 (Jan. 12, 1998). Here, despite Petitioner's efforts to re-draft the government's argument to the Court of Appeals, the Petitioner concedes, as it must, that "it is clear that federal law should control the ultimate validity of the search." Pet. 3, n.2. Therefore, review of this case is unnecessary; accordingly, this Court should deny the petition.

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III.

THIS COURT SHOULD NOT HOLD THE PETITION PENDING DISPOSITION OF PENNSYLVANIA BOARD OF PROBATION AND PAROLE v. SCOTT, NO. 97-581, BECAUSE PETITIONER HAS FAILED TO SHOW ANY GROUNDS OF ENTITLED RELIEF TO JUSTIFY HOLDING THE PETITION WHEN SCOTT'S ISSUE WOULD NOT BE INSTANTLY DISPOSITIVE.

Petitioner suggests that the petition be held pending this Court's decision in Pennsylvania Board of Probation and Parole v. Scott, No. 97-581, and disposed of as appropriate in light of that decision. Pet. 5. However, the issues that this Court has invited the parties to brief in Scott are not relevant to the decision of the Court of Appeals below.

The first question presented in Scott is whether a search of a parolee's residence must be based on reasonable suspicion to be valid under the Fourth Amendment where the parolee has consented to the searches as a condition of his parole. Here, Petitioner, without further explanation, states that "[i]f this Court concludes that reasonable suspicion is not required to justify a consent search in such a case, its decision will very likely be dispositive of the validity of the search here." Pet. 5. However, whether reasonable suspicion was so required has no impact on the ultimate question below of whether federal law governs the admissibility of evidence in federal court.

Moreover, a "reasonable suspicion" analysis is not dispositive here because it is independent of the **purpose** of the search performed (i.e. whether the search was a probation search). In Ooley, the "reasonable suspicion" issue was neither raised,

argued, briefed, or even contested in any court. Thus, the "reasonable suspicion" issue is independent of the issues and analysis of the Court of Appeals opinion.

Petitioner contends that "if the Fourth Waiver constitutes a valid consent to search, there would be no basis for suppressing the evidence obtained by the police in this case, regardless of whether the search is characterized as a `probation search' or an `investigative search.'" Pet. 5. This contention suggests that a valid Fourth Waiver would sanction any search, whether its purpose is for legitimate probationary purposes or not, including searches conducted for simply harassment purposes. Petitioner's contention cannot stand as it begs the question. To be legitimate, a search in a Fourth Waiver context must be for probationary purposes, independent of whether reasonable suspicion existed for the probationary search.

The parties in Scott recognize that, at the very least, citizens with Fourth Waivers should be entitled to expect that searches of their residences and person are reasonably related to the legitimate penological objectives of supervision. Brief for Pennsylvania Board of Probation and Parole at 24. Accord Griffin v. Wisconsin, 483 U.S. 868, 876-77 (1987) (upholding reasonable state regulation governing searches of probationers' homes satisfies Fourth Amendment).

In Ooley, the Court of Appeals simply re-affirms this notion, stating that it has been "long recognized that the legality of a warrantless search depends on a showing that the search was a

true probation search and not an investigative search" (i.e. non-probationary search). Ooley, 116 F.3d at 372.[4]

The second question presented in Scott is whether the exclusionary rule applies to parole revocation proceedings. This question has nothing whatsoever to do with Ooley. Scott involved a parole revocation proceeding in Pennsylvania, which was not part of a criminal prosecution. No police were involved, and no criminal charges were brought against Scott, in stark contrast to Respondent Ooley. The instant case involves a criminal proceeding, in which the fruits of a search by police officers provided the basis for criminal charges brought against Respondent.

Because neither question presented in Scott is instantly dispositive, Petitioner has failed to show any grounds why the petition should be held pending disposition in Scott. Therefore, the petition should not be so held.

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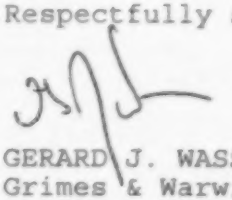
[4]Moreover, Ooley is further distinguishable from Scott because the record in Scott suggests that the search of Scott's residence was related to legitimate parole objectives. The parole agents had received information that Scott had violated parole by using weapons, and they went to his home with the purpose of attempting to locate the weapons; and they knew they were looking specifically for the weapons. However, in Ooley, the record is devoid of any such facts. Thus, the Court of Appeals correctly remanded for an evidentiary hearing.

CONCLUSION

Petitioner has failed to state any reason for this Court to grant review of the opinion of the United States Court of Appeals for the Ninth Circuit. Accordingly, this Court should therefore deny the petition.

Respectfully submitted,



Dated: March 24, 1998

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Attorneys for Respondent

CERTIFICATE OF RELATED CASES

Counsel for Mr. Ooley is not aware of any cases before this Court related to this appeal.

Respectfully submitted,

Dated: March 24, 1998

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

No. 97-1144

UNITED STATES OF AMERICA,

PETITIONER,

- VS -

NORMAN LEE OOLEY, JR.,

RESPONDENT.

PROOF OF SERVICE

State of California,)
) ss.
County of San Diego,)

GERARD J. WASSON, being counsel of record, deposes and says:

That on 24 March 1998, the brief in opposition to petition for writ of certiorari in the above-entitled case was deposited in a United States Post Office mail box located in San Diego, California, with first-class postage prepaid, properly addressed to the Clerk of the Supreme Court of the United States and within the time allotted for filing said petition for writ of certiorari;

That an additional copy of the petition and motion to proceed in forma pauperis were served on counsel for respondent:

Seth P. Waxman, Solicitor General of the United States
Sidney M. Glazer, Attorney
Department of Justice
Washington, D.C. 20530-0001

Dated at San Diego, California, this 24th Day of March, 1998.

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